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Point A. In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair prem-

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ises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them 26, 28

Point B. In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable 26, 34

Point C. In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be,

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settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court..... 27, 41

Point D. In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court..... 27, 45

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The Petition of Mae Huffman respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

For convenience petitioner and respondent will be referred to as plaintiff and defendant. The cause is a civil action, brought in the District Court of the United States for the Western District of Missouri, to recover damages, alleged at $35,000, for personal injuries received by plaintiff in a fall, on the basement stairs of a dwelling

owned by defendant in Kansas City, Missouri, alleged to have been caused by the negligence of the defendant.

Plaintiff is a citizen of the Western District of Missouri, and defendant, Home Owners' Loan Corporation, is incorporated by an Act of Congress, with "authority to sue and be sued in any court of competent jurisdiction, Federal or State" (12 U. S. C., Sec. 1463(a)). Defendant's stock is wholly owned by the United States (12 U. S. C., Sec. 1463(b)). The District Court had jurisdiction on the ground that the suit arose under a law of the United States (28 U. S. C., Sec. 41(1)), the Government of the United States being "the owner of more than one-half" of defendant's capital stock (28 U. S. C., Sec. 42).

The matter involved is a decision of the Circuit Court of Appeals for the Eighth Circuit, which, as plaintiff contends, decides a question of Missouri law in conflict with the controlling Missouri decisions, and violates the rule of *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 608, and Rule 52(a) of the Federal Rules of Civil Procedure, by disregarding, and in effect setting aside, findings of fact of the District Court, based upon substantial and abundant evidence.

In *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942, the opinions disclose, this Court took jurisdiction to determine the precise question of whether the rule of *Erie Railroad Co.* v. *Tompkins* applies where Federal jurisdiction is based upon the fact that a Federal corporation is a party. The Court did not there decide the question because the Court did not find that it was necessarily involved. Plaintiff contends that such precise question is necessarily involved in the case here presented to the Court.

Upon a trial in the District Court without a jury (R. 10-11), the Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment for plaintiff and against the defendant in the sum of $20,000.00 (R. 307-310). From the judgment so entered defendant appealed to the United States Circuit Court of Appeals for the Eighth Circuit (R. 7-9). The Circuit Court of Appeals, in an opinion by Judge Gardner, reversed plaintiff's judgment and remanded the cause for a new trial (R. 335-344, 124 F. (2d) 684) and overruled a timely petition for rehearing filed by plaintiff (R. 345-357).

On August 15, 1938, defendant rented the premises in question to one George H. Sweeney, effective September 1, 1938 (R. 187, 229). Sweeney and his wife moved in on September 1, 1938, and remained tenants of defendant on January 27, 1939, the date of plaintiff's injury (R. 187, 194-5). The Sweeneys used one room on the first floor for a beauty parlor, and the remainder of the house for residence purposes (R. 194). From November, 1938, to the time of her injury on January 27, 1939, plaintiff was employed as a beauty operator in the beauty parlor, and the Sweeneys furnished her room and board in the house as part of her compensation (R. 12-14, 29, 195).

At the time of her fall and injury, plaintiff had gone part way down the basement stairway, for the purpose of putting a glass gallon jug filled with liquid shampoo on a ledge on the top of a wall at the west or left side of the stairway. The fourth tread from the top of the stairway was split completely through lengthwise from end to end by an old season crack, and the forward portion, only from 3 7/8 to 4 7/8 inches wide, extended beyond the stringers underneath one and one-half inches (R. 130, 193, 201-2, 211, 214, 216-17, 272-3). The

trial court described the conditions as "a pitfall • • • for the unsuspecting occupants of defendant's property" (R. 316). The photograph, Plaintiff's Ex. 8 (R. 85) shows the fourth tread exactly as it was immediately after the accident (R. 81, 199). As plaintiff started to place the jug on the ledge, the forward part of the fourth tread tilted under her right foot and threw her headlong to a landing seven feet below the fourth tread (R. 14-16, 32). At the moment she fell she was turning to her left towards the ledge, her left foot on the third tread and her right foot upon, parallel and even with the outer edge of the forward part of the fourth tread (R. 37-8). The force of her fall pulled the stairway away from the wall, knocked two boards off of the landing railing, and jammed plaintiff's shoulder between the landing and the wall (R. 15-16, 196-9).

Plaintiff sustained a concussion of the brain (R. 55), and was semi-conscious or irrational ten days (R. 50-53). She had a comminuted fracture of the right shoulder (R. 51, 53, 63, 65). Broken glass cut and lodged in her head, face and right hand in many places, with a half dozen deep wounds which left disfiguring scars (R. 50, 51, 56, 57, 63). One piece of glass penetrated her right eyelid and punctured her right eyeball (R. 63, 96-99). She lost much blood and blood transfusion was necessary; she was in such weakened and shocked condition that she was not out of danger of losing her life for three days (R. 51, 54, 63, 67, 70). She was permanently incapacitated as a beauty parlor operator, and there was "serious question," as the trial judge said (R. 317), whether she would ever be able to adjust herself to any gainful occupation (R. 11-14, 28, 45-46, 48, 55, 57-58, 68, 70, 105, 108-109).

Plaintiff's Theory of Liability.

Plaintiff's amended complaint alleged that when defendant rented the premises to Sweeney it agreed to re-

pair the basement steps and thereafter proceeded to make repairs to the steps; that one of the treads of said steps (the fourth from the top under the undisputed evidence) was defective and dangerous in that it was insecure and the outer portion thereof likely to tip when a person stepped or put weight upon it, by reason of not being securely nailed to the stringer underneath it; that in the performance of repairs upon said stairs by defendant defendant negligently failed to repair said tread, remedy said defective or dangerous condition of said tread and make said tread reasonably secure, although defendant could and should have known of said defective and dangerous condition of said tread; that by reason of said negligence of defendant the tread came loose and caused plaintiff to fall and receive the injuries complained of (R. 1-3).

Findings and Evidence in District Court as to Liability.

The District Court found that when defendant rented the premises to Sweeney it agreed that it "would repair and put said premises, including the flight of wooden steps leading from the first floor to the basement of said premises, in reasonably safe condition for use and occupancy * * * and after said renting * * * undertook and attempted to repair said premises, including said steps leading from the first floor to the basement, and performed certain repairs on said premises, including said steps" (R. 307), and that "prior to and during said performance by defendant of repairs on said premises, including said steps, defendant inspected said steps for the purpose of discovering defective and dangerous conditions therein and conditions needing repairs, for the purpose of making said steps reasonably safe for use" (R. 307-8). These findings were supported by the evidence (R. 189, 193, 305, 302-3, 169-175, 180-186).[1]

1. A summary of the details of this evidence appears at pages 8, 9, 10, *infra*.

The District Court further found that "* * * when defendant attempted to repair and performed repairs upon said premises, including said steps leading from the first floor to the basement, and for a long time prior thereto, the fourth tread from the top of said steps was and had been defective and dangerous, in that it was insecure, split in two from end to end, and the outer portion thereof likely to tip when a person stepped or put weight upon it, by reason of not being securely nailed to the stringer underneath it; * * * that in said performance by defendant of repairs upon said stairs * * * defendant negligently failed to exercise ordinary care to repair said fourth tread from the top, to remedy said defective and dangerous condition of said tread and to make said tread reasonably secure, although defendant knew or by the exercise of ordinary care could and should have known of said defective and dangerous condition of said tread" (R. 307-8). These findings were supported by the evidence (R. 119-122, 130, 167, 170-175, 193, 200-202, 211, 214-15, 215-222, 248, 256-6, 273-5, 278-285, 296, 308).[2]

Rulings of the Circuit Court of Appeals.

The Circuit Court of Appeals held that "under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who actually makes a repair and as a result of his negligence in so doing injury results" (R. 340, 124 F. (2d) 687), and that "recovery could only be had for injuries resulting from negligent acts of the defendant, and we think that negligence must in the instant case be confined to any acts of attempted repair of the fourth tread" (R. 341, 124 F. (2d) 688).

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2. A summary of the details of this evidence appears at pages 10, 11, 12, *infra*.

In so ruling the Circuit Court of Appeals ruled contrary to the controlling decisions of the Supreme Court of Missouri, in *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, that if the defendant landlord in that case "assumed to repair" the porch railing there involved, but "negligently *failed*[3] to exercise ordinary care to *discover* and *repair* the defective condition, she would be liable for all damages proximately resulting from such failure," and approved as the applicable law of Missouri an earlier ruling of another Missouri Court that "when defendant (landlord) voluntarily *assumed to repair* the defective *premises* she took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she *failed to remove* rotten boards, floors, supports and other materials that should have been removed to make the place reasonably safe, she was guilty of *misfeasance* and not nonfeasance." The ruling of the Circuit Court of Appeals is also contrary to the earlier decision of the Supreme Court of Missouri in *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62, to the effect that a landlord, having undertaken repairs, is liable in damages if he is "*negligent* in *any way*, notwithstanding" he "may not have had actual knowledge of any defect."

The Circuit Court of Appeals ruled, as regards the fact of defendant's undertaking, that "it is conclusively established, not only that the defendant actually limited its repair to the bottom landing (of the stairway in question), but that Sweeney (the tenant) was advised that its repair would be so limited" (R 340, 124 F. (2d) 687).

In so ruling the Circuit Court of Appeals disregarded the District Court's findings that the defendant

3. All italics in this petition are ours.

agreed[4] with Sweeney and undertook to repair and put in reasonably safe condition for use the premises, "including the flight of wooden steps" in question, and thereafter "undertook and attempted to repair * * * said steps * * * and performed certain repairs on said premises, including said steps * * *," and "prior to and during said performance * * * of repairs on said premises, including said steps, defendant inspected said steps for the purpose of discovering defective and dangerous conditions therein and conditions needing repairs, for the purpose of making said steps reasonably safe for use" (R. 307-8).

And in so ruling and disregarding the trial court's findings the Court considered only certain written specifications[5], and disregarded the following uncontradicted evidence, which supported the trial court's findings:

> Sweeney testified that defendant's representatives Hess and Kelly told him that the *premises would be put* 'in safe and livable condition' (R. 305); that he mentioned the stairs to Hess and that Hess told him 'the *house* would be * * * put in first [class] condition from the roof to the yard' (R. 189); that Hess told him 'from time to time not to worry about it, *the place* would be put in safe condition and ready for me by the 1st of September' (R. 193). Hess, while testifying that he gave Sweeney the specifications to look over, admitted that '*further than that*' he told Sweeney 'that the *house* would be placed in *rentable condition*', and, when asked whether he told Sweeney that the re-

4. Plaintiff's suit is not in contract for breach of defendant's agreement with Sweeney. Defendant's agreement with Sweeney, however, was competent evidence of defendant's undertaking to repair the stairway, which is the basis of defendant's tort liability (*Shaw* v. *Butterworth*, 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60).

5. Which were prepared upon a prior inspection and later given to a contractor whom defendant employed to work on the premises after the letting to Sweeney (R. 113-114, Exhibit 11, R. 135-163, R. 141, 236-47).

pairs 'would be *general and complete*', admitted 'I believe *that was* the, you might say, context of our conversation' (R. 302-303).

Defendant's Inspector King testified that defendant employed and authorized him to inspect the premises during the progress of repairs; that he made five such inspections (R. 171, 181, 182, 169); that it was his duty to *discover* anything in or about the premises that was 'unsafe,' whether it was specially covered by the formal specifications or not (R. 170, 180, 182, 173); that he inspected the 'stairway' in question to see whether it was 'secure' and 'safe', 'safe to hold a person' (R. 172-173, 182); that it was his duty to inspect 'and check along the stringers', to see whether the nails were 'driven' into the stringer or had 'chipped off part of the stringer' so they were 'not holding' (R. 173, 170); that in inspecting the stairway he stood on the basement floor 'alongside these stairs' (R. 173) so that the 4th tread (which tilted and threw plaintiff) was 'just about at the level of your eyes' (R. 173); that he made an examination to see what kind of nails were holding *the treads* to the stringer (R. 175); that he went under the stairway 'to see that the nail was nailed in properly' (R. 186); that while under the stairway he could observe the condition of the entire stairway (R. 185-186); that he actually 'noticed' the 'chipped part of this stringer', and 'imagined' he saw that one of the nails supposed to enter that stringer on the 4th tread was 'sticking out' and 'out holding' (R. 174); that he was hunting for anything 'unsafe', whether included in the specifications or not (R. 170, 180, 182, 173), and although he knew that this was not 'proper construction' he nevertheless failed to have the 4th tread repaired (R. 174). As to King's *duty* upon discovery of the foregoing obviously hazardous condition, he testified as follows (R. 170):

"Q. Suppose you would see something that was a hazard there or something that would make

the place unsafe, it was your *duty,* wasn't it, to report that and *get something done about it?* A. I would make a report on it.

Q. That was a part of your duties, wasn't it? A. *Oh, certainly.*

Q. They didn't want you out there and inspecting and leaving a place in an unsafe condition, did they? A. That is right."

Lastly, the Circuit Court of Appeals ruled "but if • • • it be assumed that the defendant might be held for any failure to exercise ordinary care in the repair of the entire stairway, we do not believe there is substantial evidence to sustain the judgment" (R. 341, 124 F. (2d) 688), and concluded that "there was no substantial evidence that the defendant failed to exercise ordinary care in attempting to ascertain the condition of this fourth tread, nor in failing to repair it" (R. 343, 124 F. (2d) 688).

In so ruling the Circuit Court of Appeals has disregarded the finding of the trial court that in the performance by defendant of repairs upon the stairway "defendant negligently failed to exercise ordinary care to repair the fourth tread from the top, to remedy said defective and dangerous condition of said tread and to make said tread reasonably secure, although defendant knew or by the exercise of ordinary care could and should have known of said defective and dangerous condition of said tread" (R. 308).

And in so ruling and so disregarding the trial court's findings the Circuit Court of Appeals disregarded the following evidence which overwhelmingly supported the trial court's findings:

The 4th tread from the top (which tilted and threw plaintiff) was 'split clear through', lengthwise, 'from end to end' (R. 130, 201-2, 211, 193).

The split or crack was an old one (R. 193, 214, 278, 282-3), 'possibly 15 years old' (R. 130). There was paint down in the crack (R. 201, 214-15), apparently 4 or 5 years old (R. 231). There were 'scrapings of lint' in the crack (R. 202). A corner of the east stringer under this 4th tread was broken off, so that one of the nails supposed to hold the tread to the stringer did not enter the stringer at all (R. 120, 275, 278, 174, 175, 202, 296). This nail had 'paint on it', showing that it was 'not holding' to anything (R. 120, 296, 275, 278). The north half of the tread (the half which tilted and threw plaintiff) was 3-7/8 inches wide at the east end and 4-7/8 inches wide at the west end (R. 274). The overhang of the north edge of the tread, that is its projection to the north beyond the stringers, was 1½ inches, or about 1/3 of the full width of the tread (R. 216-17, 272-3, Exhibit 11). In this north or broken-off half of the tread there were two nails in the west end (an 8-penny and a 16-penny), and there were two 8-penny nails in the east end (R. 220, 119-120, 256). The front or north one of these latter two nails had missed the stringer entirely, and was not holding to anything; and the other nail had worked up and down in its hole so much that 'you could almost drop a new nail down in the hole' (R. 200, 220, 120). It is conceded that 8-penny nails were inadequate to hold a tread as thick as this one, and that 16-penny nails should have been used instead (R. 256, 278-9, 281, 220, 167). Under the foregoing conditions, the 4th tread was not reasonably safe for use (R. 220-1, 257, 279, 284, 285). It was likely to tilt if a person should step on the front or north edge (R. 221, 222, 256, 257, 259, 279, 284, 285), and was therefore likely to 'throw' any person using the stairway (R. 122). The danger of this would be increased if the weight of a person were placed on the north or front edge of the tread (R. 222). The undisputed evidence is that all treads in stairways should be strong enough to 'hold the weight of a person standing any place on tread' (R. 221-2).